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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1024

CITIZENS FOR PARENTAL RIGHTS, et al.,
Appellants,

vs.

SAN MATEO COUNTY BOARD OF EDUCATION, et al.,
Appellees.

On Appeal from the Supreme Court of the State of California

AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANTS

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The Women's Committee for Responsible Government, an unincorporated association of parents and taxpayers in San Mateo county, submits at appellants' request its amicus curiae brief in support of appellants' jurisdictional statement under written consent of appellees, dated March 5, 1976.

QUESTIONS PRESENTED

1. Did the court below broaden the meaning and effect of the California excusal statutes so as to uphold their constitutionality?

2. Did the court below, while claiming to dismiss the complaint, impermissibly decide on the merits and without evidence the constitutionality of the challenged instruction and the excusal statutes purporting to safeguard it?

QUESTIONS DISCUSSED

1. THE COURT BELOW WITHOUT EXPLANATION OR BASIS BROADENED THE EXCUSAL STATUTES IN ORDER TO MASK THEIR CONSTITUTIONAL DEFICIENCY.

The constitutionality of the sex and family life educational program was largely based by the court below on the right of parents under two excusal statutes to withdraw their children from the challenged instruction (appendix, p. 4). The court characterized the excusal statutes as follows:

> The Legislature, pursuant to Education Code sections 8506 and 8701, therefore, *established an "excusal system" whereby parents and guardians had the option of withholding or withdrawing their children from the program by submitting a written excuse to the school.* (emphasis in original).
>
> (Appendix p. 39)

* * *

> In sum then, the direct answer to the parents' contentions concerning free exercise is that the program against which the parents seek a permanent injunction is not compulsory as Education Code sections 8506 and 8701 provide that the student may be excused from any part that conflicts with the parents' religious beliefs *or that uses materials to which the parents object.* (emphasis added).
>
> (Appendix p. 24)

The court gave no basis for according such breadth to the excusal statutes. It is true that the term "religious training and beliefs" as used in §8701 includes "personal moral convictions," which term is, however, otherwise undefined in the code. If the Selective Service Act of 1967 is any guide, 50 App. §456(j), more is required than a personal objection to the materials. §8506 prohibits a school from compelling attendance at any class teaching human reproduction. Apparently, no reason for pupil excuse is required. §8701 permits a parent to obtain the pupil's excuse from any part of the health, family life or sex education curriculum which conflicts with the parent's religious beliefs, including personal moral convictions.

Even when read together and broadly construed, these statutes do not, as the court claims, permit pupil excuse from the "program" or any part of it that "uses materials to which the parents object." (Appendix, pp. 24, 39) §8701 permits only limited excusal from any part of the instruction conflicting with parental religious or moral convictions.

Appellants claim that the instructional materials invade individual privacy and are a state vehicle for unlawful incursions into parental authority over the family. If the state's legitimate business does not extend to evaluating individual or family habits, conflicts, discipline, incentives, rewards, roles or attitudes, then excusal statutes based on religious or moral convictions

offer little protection. Appellants claim that the state may neither indoctrinate in sex or family life nor create a captive forum for discussing controversial matters from which opposing parental viewpoints are excluded. *Police Department v. Mosley,* 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Yet, no pupil excuse would appear available to the parent whose only objection is that his privacy is impaired or his standards, goals and authority at home are undermined by the state sociologist at school. If a religious or moral conviction in conflict with the educational materials cannot be proved, the pupil must submit to the offending instruction. The excusal statutes do not, therefor, meet the constitutional objections raised.

The state guidelines, according to exhibits reviewed by the court below, give wide discretion in presenting the materials. Such discretion permits the teacher (who may be unmarried or childless) to discuss and evaluate parental judgment and practices in individual families as divulged by the pupils. While the excusal statutes require a preview of the educational materials, their presentation is beyond parental control and scrutiny.

When state practices are claimed to infringe upon constitutionally protected personal rights, the state must justify its conduct by some compelling governmental interest. *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) at p. 407; *Martin v. City of Struthern,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), at pp. 144-149. No governmental interest is evident here except the court's fleeting

reference to the health of the state's children and the balancing of state and parental interests in a factual vacuum. (Appendix pp. 17, 23, 31, 39).

Some of the constitutional objections to the family life and sex education course could perhaps be overcome by permitting pupil excuse from all or any part of the offending course upon parental request for whatever reason. If the excusal statutes are to be read as allowing that option, the court should say so clearly. The parent could then substitute some other course or activity without the implicit coercion connected with the pupil's optioning out of sensitive parts of the family life course on religious or moral grounds.

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2. GRAVE CONSTITUTIONAL ISSUES SHOULD NOT BE DECIDED ON DEMURRER OR DISMISSAL

The court below heavily relied on cases fully tried on the merits in order to decide the same issues on a motion to dismiss. In so doing, the court raised numerous questions of fact which it disposed of without pause. (Appendix, pp. 10 n. 6, 17, 21, 22, 24, 27, 28, 30, 31, 35, 35 n. 27, 36, 37, 39).

The court apparently presumed either that appellants could proffer no evidence beyond the exhibits attached to the complaint or else that its own broad interpretation of the excusal statutes fortified the entire curriculum against constitutional deficiency. Its opinion is a sterile treatise on the law as applied to the religion, equal protection, and privacy contentions of the appellants. In each instance, the court balanced the

parties' respective interests in a factual vacuum. (Appendix, pp. 23-24, 37, 39). The central issue of whether or not appellants had stated a cause of action was relegated to a footnote, with the court going on to decide the issues as if a full trial had occurred on the "unstated" causes of action. (Appendix, p. 5 n. 4). The court's own opinion quotes language admonishing a full hearing!

> "The courts have repeatedly held that unconstitutionality based on alleged violations of the religious clauses of the first amendment must be decided on the facts as they appear in each particular case. (Appendix, p. 29)

Here, there were no facts before the court, merely a motion to dismiss the complaint:

> We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer.

Borden's Farm Products Co. v. Baldwin, 293 U.S. 194 at 213, 55 S.Ct. 187, 79 L.Ed. 291 (1934)

Even if the court could have decided some of the issues on a limited record, it should not have precluded trial of the constitutional issues of privacy and parental control:

> It would perhaps be possible for us to decide this last issue on the present record but we think we should not do so. Very important constitutional questions are presented and the Supreme Court has repeatedly informed us that such difficult

> issues should not be decided except upon a full record and after adequate hearing. Polk Co. v. Glever, 305 U.S. 5, 59 S.Ct. 15, 83 L.Ed. 6 (1938); Borden's Farm Products v. Baldwin, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 291, concurring opinion, 293 U.S. 213, 55 S.Ct. 193, 79 L.Ed. 290 (1934); Villa v. Van Schaick, 299 U.S. 152, 57 S.Ct. 128, 81 L.Ed. 91 (1936). See also Honeyman v. Hanan, 300 U.S. 14, 25, 57 S.Ct. 350, 81 L.Ed. 476 (1937); Patterson v. Alabama, 294 U.S. 600, 607, 55 S.Ct. 575, 79 L.Ed. 1082 (1935); Rescue Army v. Municipal Court, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947); DeBacker v. Brainard, 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148 (1969), and Cowgill v. California, 396 U.S. 371, 90 S.Ct. 613, 24 L.Ed.2d 590 (1970).

Braden v. University of Pittsburgh, 477 F.2d 1 (3rd Cir. 1973)

CONCLUSION

The court below hinged its affirmance of the dismissal on excusal statutes which on their face do not reach the constitutional objections of privacy and parental control raised by the complaint. Since the breadth of the excusal statutes was exaggerated without any basis, appeal to this court is justified so that remand may be ordered for a trial on the merits.

Dated, March 17, 1976.

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